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Supreme Court of the United States

October Term 1919. No. [redacted]41

WELLS FARGO & COMPANY,
Petitioner-Complainant below,

against

OSCAR G. TAYLOR,
Respondent-Defendant below.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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OCTOBER TERM 1919.

No. 112.

WELLS FARGO & COMPANY,
Petitioner-Complainant below,

against

OSCAR G. TAYLOR,
Respondent-Defendant below.

BRIEF FOR RESPONDENT-COMPLAINANT BELOW.

Statement.

This case comes here on a writ of *certiorari* to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, reversing the decree of the District Court granting the complainant's application for a permanent injunction.

The suit was instituted to compel the specific performance of a contract entered into between the complainant and the respondent July 12, 1910, and to restrain the respondent from collecting a judgment he had obtained in the State Court of Mississippi.

The principal question in this case is whether the Federal Employers' Liability Act (approved April 22nd, 1908) does or does not apply to an express company, like this petitioner, which does not operate or direct any railroad or railroad trains, but which by virtue of a contract with a railroad company has its express matter transported for it over the lines and upon the trains of that railroad for an agreed compensation.

Pursuant to a contract with the St. Louis and San Francisco Railroad Company, in which as part consideration for the carriage of its express matter, the express company agreed to protect it from any claims for injuries to employes of the express company (R. 11), this petitioner, on Dec. 8, 1909, sent certain interstate express shipments, in the custody of the respondent as its express messenger, between points on the line of said railroad. The train was wrecked and the messenger sustained personal injuries (R. 61). He sued the railroad company in the State Court (R. 28). The express company, after having tried unsuccessfully to have itself made a party to that action, began an equity suit in the Federal District Court for the Northern District of Mississippi, seeking to restrain temporarily and upon the final hearing therein to enjoin perpetually said Taylor from proceeding with said law suit against the St. Louis and San Francisco Railroad Company and for a decree that he specifically perform and carry out his agreement by which he had assumed all risk of his said employment and had agreed to hold harmless both the express company and the railroad company (R. 22).

Both the contract between the railroad company and the express company and the "Messenger's Agreement" executed by said Taylor were set out at length as parts of the Bill in this suit (R. 7).

The motion for a restraining order was denied. Said Taylor, on July 12, 1910, obtained judgment for $4,000.00 against the railroad company, and this fact was alleged herein by a Supplemental Bill (R. 61).

Later, the State Supreme Court meantime having sustained said Taylor's judgment against the railroad company, a new motion for temporary injunction herein was granted (R. 61).

The cause was heard at the April term, 1914, of the United States District Court, and on October 2nd, 1914, a final decree was rendered in favor of this petitioner and against said Taylor.

Taylor appealed to the Circuit Court of Appeals and the decree was reversed and the cause remanded, the court holding that the bill was insufficient, in that it failed to allege that said Taylor was not a joint employe of the railroad company and this petitioner, and was not in the employ of the railroad company at the time of his injury.

In the lower court the bill was amended accordingly and additional testimony was introduced by each party. Decision was rendered in favor of the appellee, sustaining all the allegations of the bill (R. 55). This decree in part reads as follows:

* * * "and it appearing to the Court that all the allegations of the Original Bill, and the amendment thereto, and the supplemental bill, are true as therein stated, and that the institution

and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis and San Francisco Railroad Company was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the complainant Wells Fargo & Company, and was a fraud practiced by the said Taylor upon the complainant"; * * *

From this decree also an appeal was taken by said Taylor and the Circuit Court of Appeals has now reversed that decree and holds that the "Messenger's Agreement" is made void by section five of the Federal Employers' Liability Act, approved April 22nd, 1908 (R. 60).

ASSIGNMENTS OF ERROR IN THE CIRCUIT COURT OF APPEALS.

The respondent's assignments of error in the Circuit Court of Appeals were:

1. The District Court erred in permitting the complainant to amend this bill.

2. The District Court erred in refusing to dismiss the bill and dissolve the injunction because:

(a) The contract sued upon was contrary to public policy.

(b) The contract sued upon was void under Section V of the Federal Employers' Liability Act.

(c) The Federal Court had no jurisdiction to enjoin the enforcement of a judgment secured in the State Court.

The petitioner contends here that the Circuit Court of Appeals erred in reversing the decree of the District Court upon any of the above assignments of error.

FIRST POINT.

The Federal Employers' Liability Act does not apply to express companies.

(a) *This Court has inferentially held that the Act applies only to Railroads.* The first Federal Employers' Liability Act approved June 11, 1906, applied to "every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the several states, etc., or with foreign nations."

This act came before the Supreme Court in what is known as the First Employers' Liability case, *Howard* vs. *The Illinois Central Railroad Company,* 207 U. S. 463; and was held invalid by this court in that it went beyond the power of Congress under the Commerce clause by including all employes of such carriers and not limiting the act to employes engaged in such commerce.

Following this decision, Congress passed the present act, approved April 22, 1908, applying it to "every common carrier by railroad while engaged in commerce between any of the several states or territories or between any of the states and territories or between the District of Columbia and any of the states or territories or between the District of Columbia or any states or territories and any foreign nation."

In *Mondu* vs. *N. Y. N. H. & H. Ry. Co.,* 223 U. S. 1, this court held the present Act constitutional.

"Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and it is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce * * * But it does not follow that this classification is violative of the 'due process of law' clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. Tested by these standards this classification is not objectionable. *Like classifications of railroad carriers and employes for like purposes,* when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Ry. Co.* vs. *Mackey,* 127 U. S. 205: *Louisville & Nashville Railroad Co.* vs. *Melton,* 218 U. S. 36; *Mobile, Jackson & Kansas City Railroad Co.* vs. *Turnipseed,* 219 U. S. 35." (Italics ours.)

It will be seen that Mr. Justice Van Devanter considered this act to be a classification of railroad carriers of the same character as the classifications considered in the cited cases, all of which construed statutes applying only to "railroad companies." We submit that the above

case is an express holding of the U. S. Supreme Court, that the term "common carrier by railroad" does not include express companies within this meaning but applies only as it says to "railroad carriers." So far as the petitioner has been able to discover, this Act has never been held to cover any other business than railroading.

(b) *The intention of Congress to so limit the application of this Act is conclusively shown by the Senate Record at the time the Act was under discussion..* At this time the bill had passed the House in practically its present form, although there had been considerable discussion by the members of the House as to whether it should not be extended to include all common carriers. The bill was supported by Senator Dolliver, Chairman of the Committee on Interstate Commerce. At the end of Senator Dolliver's speech favorably reporting the bill, Senator Foraker interrupted as follows:

> "Before the senator from Iowa closes his remarks I want to ask him simply for information—I have had no opportunity, this bill having passed the House only two or three days ago, to read the report which was made in the House in support of the bill—what reason the House gave for limiting the application of this bill to *carriers by rail,* instead of applying it as we did in the law of 1906 to all interstate carriers whether by rail or by water or otherwise."
>
> "Mr. Dolliver: I have read, Mr. President, the House report with some curiosity on that question and I regret to say that nothing appears so far as I remember, in the report,

to indicate why the House took that action; but in view of the fact that a question of the constitutionality of the act, because it was made applicable to *railways to the exclusion of other interstate carriers*. was afterwards raised in the House, I have thought that may be someone not particularly interested in the ultimate success of the statute may have secured the limitation measure in that way. Although I do not think that the law is any less constitutional because it is made applicable to all common carriers over whom we have jurisdiction, because there ought to be uniformity—uniformity along the broad lines of justice." (Congressional Rec., Apr. 9, 1908, p. 4528.)

This explanatory statement seems to have caused considerable debate, and it was moved that the act be amended to include all common carriers on land or water. This was opposed by Senator Carter of Virginia, who spoke in part as follows:

> "I desire that this enactment shall apply to the great army of men who are engaged in *operating trains* in interstate commerce. If we succeed in getting through the Congress an enactment which will be approved by the Supreme Court on that subject, we will have achieved a great triumph, and we can later take up the subject of the rights of seamen on board the ships. The mechanism of the ship is very materially different in different cases. The steam vessel, the sailing vessel, and the rules and regulations applicable to each, will have to be considered then. The adjudications under maritime law will be the subjejct of investigation, and it will prove a most instructive line of inquiry when we reach that branch of the subject.

> At present, Mr. President, I desire to cooperate with my fellow senators here in the passage of a bill *which relates to railroad employees alone* and I hope that the bill as it came from the House will pass the Senate without being complicated by needless extension to other less subjects." (Italics ours.)

The amendment was defeated, and the bill was passed in the same form.

(c) *Similar language in other similar Acts has been construed as not applicable to express companies.* While the above cited case is the only one bearing directly on the scope of the term "common carriers by railroad" in the Federal Employers' Liability Act, the same language employed by Congress in other acts has been held to apply only to railroads, and under the well established rule that language previously interpreted by the courts will be presumed to have been used by the legislature in the sense of such previous interpretation, there is much authority for limiting it to railroad companies.

> *United States* v. *Falk,* 204 U. S. 143;
> *United States* v. *Cerecedo,* 209 U. S. 337;
> *Latimer* v. *United States,* 223 U. S. 501;
> *Bruce* v. *Tobin,* 245 U. S. 18.

The original Act To Regulate Commerce approved February 4, 1887 (24 Stat. at 1.379) was limited by its terms as is the Federal Employers' Liability Act of 1908.

Acts to Regulate Commerce.	Employers' Liability Act.
"*Any common carrier or carriers* engaged in the transportation of passengers or property wholly *by railroad* or partly by railroad and partly by water, when both * * *	"*every common carrier by railroad.*"

The Interstate Commerce Commission held (in re Express Companies, 1 I. C. C. 677) that express companies were not within the application of the first Interstate Commerce Act, saying at page 683:

> "It is further claimed that the details of the Law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies, without various implications and eliminations which give a somewhat strained construction to the language used; and to this reasoning also there is much force. For example, the first paragraph of Section 6 requires carriers "to print and keep for public instruction schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad." The words "its railroad," the express companies say, exclude the idea that they are intended by the Law, for they have no railroads; they neither own nor operate any railroad lines. It is true that they hire the use of the railroads of the railroad companies,

> or, in other words, they purchase the right of railroad transportation for goods which they undertake to transport; nevertheless, the language of this section and of other sections is not well chosen to clearly express an intention to bring express companies within their scope."

This reasoning applies exactly to Section I of the Federal Employers' Liability Act which provides that:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering any injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in *its cars, engines, appliances, machinery, track, railroad-bed, works, boats, wharves, or other equipment.*" (Italics ours.)

So great was the similarity between the wording of these acts and so clear the inference to be drawn from this similarity and the decision of the Interstate Commerce Commission, that the Circuit Court of Appeals in this case felt itself constrained to distinguish the decision of the Interstate Commerce Commission from the present case, saying (R. 62):

> "In reaching a conclusion that the express companies were not included an unconvincing argument was based upon the use of the word 'wholly'. The Commission says:

'The use of that word in the section which was evidently framed with the greatest care affords a fair foundation for the claim that the Act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms.'

The proposition which seems to have been most meritorious in reaching the conclusion was:

'That the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used.'

A number of examples are given in support of this proposition. The Commission finally suggests:

In case of doubtful jurisdiction, it is far better that the legislative body should resolve the doubt.' "

Notwithstanding this opinion of the lower court as to the weakness of the reasoning involved, the decision of the Interstate Commerce Commission was followed in:

United States vs. *Morseman,* 42 Fed. 448;

Southern Ind. Exp. Co. vs. *U. S. Exp. Co.,* 88 id. 659;

Same case (in C. C. A.), 92 id. 1022.

This Court also held to the same effect in *American Express Company* vs. *U. S.,* 212 U. S. 522, where it said at page 534:

> "As originally reported the Act did not apply to Express Companies. The Section was originally framed with the intention of making a provision for railroad carriers."

Of this decision the lower court in this case uses the following language:

> "This holding of the Interstate Commerce Commission was not more than acquiesced in by the courts. *Am. Ex. Co.* vs. *U. S.*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635. It is to be observed that the language of the act which was under construction is very different from that employed in the Employers' Liability Act. Even if the processes of reasoning were entitled to greater respect, the decision would not be held applicable to the present case."

The fact that Congress, in 1906, without waiting for the Interstate Commerce Commission decision to be reviewed by this court, amended the Act to Regulate the Interstate Commerce so that it specifically included express companies, indicates that Congress, as well as the Supreme Court "acquiesced" in this interpretation of the language of the original Act.

Certainly the language used by the Interstate Commerce Commission is peculiarly applicable to this case (I. C. C. 682).

> "It is moreover true, as claimed, that the express business, so-called, has been of such long standing and presents such a well known and complete organization in every portion of the country that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the

> law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congress, both in connection with railroad business and as contradistinguished therefrom."

As the Employers' Liability Act has been held by this Court to be *in pari materia* with the Safety Appliance Act (*San Antonio R. R. Co.* v. *Wagner*, 241 U. S. 476, 484), the language used by Congress in the latter Act is particularly persuasive in considering the interpretation to be given the language of the former. In the Safety Appliance Act of March 2, 1893, Section 1, it was forbidden to "any common carrier engaged in interstate commerce by railroad to use on its lines any locomotive, engine, etc." The same language is used in Section 1 of the Ash Pan Act of May 30, 1908. Subsequent sections of the above Act of March 2, 1893, refer to *such common carrier*, but Section 3 says, "when any person, firm, company or corporation engaged in interstate commerce by railroad," etc. This language is even broader than the act under discussion. Section 4 says, "it shall be unlawful for any *railroad company* to use any car not provided with secure grab irons." It is to be noted that in this Act Congress uses the phrases "common carrier by railroad," "railroad company" and "corporation engaged in interstate commerce by railroad" interchangeably, and that in Section 2 of the Ash Pan Act of May 30, 1908, the court uses the exact language as in the Act now under consideration, "it shall be unlawful for *any common carrier by*

railroad in any territory * * * to use any locomotive not equipped with an ash pan," etc.

The Hours of Service Law, Section 1, uses the expression "common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad, etc." The latter part of this section defines the meaning of some of these terms as follows, viz:

> "The term Railroad as used in this Act shall include all bridges and ferrys used or operated in connection with any railroad, and also all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract agreement or lease; and the term Employees as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any trains."

In other words, under the above definition, an employe of a common carrier of interstate commerce by railroad, means a person actually connected with the operation or movement of trains and it follows that this person's employer must necessarily operate or move such trains. This excludes any possibility that express companies are included by this term.

An express company, we submit, could not be spoken of as a common carrier by railroad nor as a common carrier by water, nor as a common carrier by stage-coach. It is simply a common carrier of express matter, and when Congress desires to legislate about this very important branch of the business of the country and the corpora-

tions engaged in it, it will use the term "express companies", just as it did in the amendment of 1906 to the Interstate Commerce Act.

Thus in the Act of June 29, 1906, known as the "Twenty Eight Hour Live Stock Transportation Law", Congress specifically provided, "That no railroad, express company, car company common carrier other than by water, etc."

Moreover, the sense in which Congress used the words "common carrier by railroad" is admirably shown in the report of the Committee appointed in 1910, for the purpose of investigating "Employers' Liability and Workmen's Compensation". By a joint resolution of Congress passed on June 25th, 1910, a commission was created for the purpose of making a thorough investigation of the subject of "Employers' Liability and Workmen's Compensation". This Committee in due time made its report to the President, and the President submitted this report to Congress on February 20, 1912. In Volume 1, Page 59 thereof under the heading "(B)" THE PROPOSED LAW CONFINED TO COMMON CARRIER BY RAILROAD", said subdivision reads as follows:

> "It will be observed that common carriers by railroad constitute the only class of employers covered by the proposed law, though the commission has been urged to include other classes of employers who may be subject to the regulating power of Congress. The Commission has not deemed it advisable to follow these suggestions, but after very thorough consideration has confined the operation of the law which it proposes to *Railroad Companies* for the following among other reasons.

(1) Because, as it seems to the Commission, the law as applied to the railroads is clearly constitutional for the reasons already set forth, and it would not be wise to endanger its validity by including other employers as to whom the authority of Congress is not so clear, thereby introducing into the proposed law an element of uncertainty which would not otherwise exist. For example, as to some of these other employers, it may be plausibly urged that they are not engaged in a class of work or with instrumentalities greatly or inherently dangerous, and while this fact would not be conclusive against the validity of the law, it would eliminate or detract from the force of the arguments, already indicated, in support of it when confined to the extra hazardous occupation of railroading. As to still others the connection between the direct effect of a law to promote the safety of the employees and the consequent effect of safe-guardiing the commodities and passengers with which the employees deal is not entirely clear, as we think it is in the case of the railroad service considered by itself.

(2) The proposed law follows in this respect the amended Employers' Liability Law which has been upheld by many of the Federal Courts upon grounds peculiar to the railroad service, and since the main portion of this report was dictated by the decision of the Supreme Court of the United States in the case of *Mondou* v. *New York, New Haven & Hartford Railroad Co.,* in an opinion delivered by Mr. Justice Van Devanter on January 15, 1912 (223 U. S. 1).

(3) The railroad companies affected employ a great army of employees and have invested

> a vast amount of capital; the service extends into every part of the country, and altogether furnishes a field of such extent for the operation of a law of this character and presents so many features differing essentially from other classes of industry that a law whose details would be appropriate to that service would be in many respects inapplicable to other forms of industry. The railroad industry therefore may well be dealt with separately, particularly in the initial stage of the legislation. If hereafter it shall be found wise to extend the provisions of the law to other interstate carriers such as telegraph and telephone lines, or to other industries engaged in interstate commerce, that may readily be done by amendment or supplemental legislation as has been done in the case of the Interstate Commerce Law."

The court will notice that the above quotation begins by using the term "common carrier by railroad," and in the same paragraph uses the term "railroad company" as meaning the same thing or as an interchangeable term.

The business done by express companies was not the sort which Congress intended to regulate by this act. The express company does its transportation through other carriers in most instances. There was a time when all transportation was by pony express and stage coach. It uses steam vessels and sailing vessels and automobiles for transportation as well as dogsleds and railroads. It is a common carrier, admittedly, but could not be described as a common carrier by railroad.

The speech of Senator Carter of Virginia above quoted, as well as the fact that the Senate

defeated all attempts to extend the act beyond common carriers by railroad clearly show that the act was never intended to cover the express business in general. Moreover, by virtue of these contracts with railroad companies, the express company neither owns nor operates railways, trains or cars propelled by dangerous agencies nor employs people to operate them. There are no employes in danger on account of the negligence of fellow employes of express companies on account of the operation of trains. An employe of an express company is in no danger from the acts of his fellow servants and he is in no more danger from the operation of cars than any one else who rides upon a passenger train. He is in no danger from defective machinery, cars or equipment except as any passenger would be. We submit, therefore, that there would be no reason why this act should apply to the employes of an express company.

Résumé.

It will be seen therefore, that the term "common carrier by railroad" has been very frequently employed by Congress and apparently employed in the sense synonymous with railroad companies. To sum up briefly these instances:

(1) The Employers' Liability Act now under discussion in the debates in Congress on its final passage in its present form appears to have been limited to railways and men operating trains on railways.

(2) On coming before this court for the first time, in *Mondu* vs. *N. Y. N. H. & H. R. R. Co. supra,* the terms "common carrier by railroad," "railroad carrier" and "railroad companies" were apparently construed as synonymous terms.

(3) Practically identical language in the original Interstate Commerce Act was construed by the Commerce Commission, the body charged with its enforcement, as being limited to railroad companies and this construction was followed by the Federal Courts, including this court.

(4) The Safety Appliance Act is construed by this court as in pari materia with the Employers' Liability Act using the terms "common carrier by railroad" and "railroad company" interchangeably, and the text of both acts, as well as the Hours of Service Law in which the same term is employed, so clearly, by their reference to peculiarities of the railroad business, refer only to railroad companies that it is little wonder that this particular question of the applicability of the act to express companies is here raised for the first time, notwithstanding the fact that the act has been in force for more than eleven years.

(5) The common understanding and general construction of the effect of the term "common carrier by railroad" is very forcibly illustrated by the report of a committee created by joint resolution of Congress for the investigation of employers' liability and workmen's compensation which uses the terms "common carrier by railroad" and railroad companies" as interchangeable terms and

makes its recommendations specifically with respect to railroad companies.

From the consideration, therefore, which the particular question before the court has had by the courts, the Interstate Commerce Commission or other public bodies, it clearly appears that the term "common carrier by railroad" has been without dissent, up to the present case, held to mean railroad companies who are common carriers, probably as distinguished from those railroad companies who are private carriers, such as lumber railroads or other private interests which have not engaged to serve the public in the capacity of common carriers.

The opinion of the court below in which the contrary was held, is the first holding of the kind that we are able to find and is of little assistance to us in arriving at the reasons which govern the court in reaching this conclusion, since the court appears to have assumed in advance of its decision that the term "common carrier by railroad" included any common carrier who, by contract or otherwise, did a part of its business over a railroad line. We submit that this assumption of the court below is absolutely unwarranted by the facts, and that a substantial difference exists between a common carrier operating a railroad whose employes are subject to hazard by reason of their occupation such as are covered by the Act, and a common carrier who merely has its business carried over a railroad and whose employes have nothing to do with the operation of trains.

Notwithstanding the conclusive presumption that Congress used the language "common carrier

by railroad" in the sense in which it had been previously interpreted, not only by the body charged with the enforcement of an act containing such language, but by the courts as well, the court below, usurping the function of the legislature, endeavors to give a wider application to the language employed in the act, apparently upon the ground of public policy and the tendency of the times.

We have shown earlier in this brief how the Circuit Court of Appeals attempted to explain away the importance of the decision of the Interstate Commerce Commission in 1 I. C. C. 677.

It then takes up an analysis of *Robinson* vs. *B. & O. R. R.*, 237 U. S. 84, which it declares is not a conclusive holding that "a messenger, hired by an express company, is not an express company employee." Such a proposition has never been advanced by the petitioner and it seems probable that the learned Judge of the Circuit Court of Appeals meant that it was not authority for the proposition that an express messenger is not a railroad company employee.

Whatever may have been its real opinion of the Robinson case, the Circuit Court of Appeals then proceeded to elaborate its reasons for its theory that express companies are included in the application of the Employers' Liability Act. It discusses the theory that employees of the express company are employees both of the railroad company and the express company but finally discards it as not necessary for its decision, which it then proceeds to base upon the general ground that the language of the Act clearly and unequivocally applies directly to express companies.

It is submitted that the language of the Act as a whole, and especially Section 1, clearly indicates that it contemplates carriers who own and operate railroads, rather than mere users of transportation privileges. So far from being clearly and unequivocally applicable to express companies, a careful reading of the Act shows that it is clearly and unequivocally inapplicable. It should be remembered that the Act is derogatory of the established principles of the Common Law and should therefore be strictly construed. Much of the reasoning used by the Circuit Court of Appeals in support of this decision is ambiguous—some is inexplicable. It is hard to follow this reasoning when it says:

> "No court ought at this time, in the face of the unequivocal language of Congress, to make a rule which would differentiate express company messengers, not alone from other persons engaged in the hazard of railroading, but from all other railroad persons engaged in hazardous businesses."

It is equally hard to follow this prophetic vision into a future where the Employers' Liability Act is nullified by the railroads farming out all their functions to intermediary transportation companies. The fact that the Act applies to railroad conductors is no more significant to show an intention by Congress to make the Act applicable to express messengers than to make it applicable to Pullman porters.

SECOND POINT.

The Employers' Liability Act, even if applicable to express companies, would not affect the contract in question.

The respondent Taylor relies especially on Section 5 of the Employers' Liability Act to avoid the release. As we have seen, this section provides that:

> "Any contract * * * the purpose * * * of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."

It should be noted that these contracts are not rendered absolutely void, but only void, *in so far* as they attempt to release a liability created by the Act. It seems clear that express companies are not included in the scope of the Act, and therefore no liability is created thereby so far as they are concerned. The Circuit Court of Appeals devoted its whole opinion to an attempt to justify the inclusion of express companies in the terms of the Act on the theory that "if the terms of the Act apply to express companies, the contract between Wells Fargo & Company and the messenger is void," and having proved that point to its own satisfaction, it rested. A closer scrutiny of the Act, however, shows that this was *not* enough. For even if express companies are directly included within the Federal Employers' Liability Act, a release of the railroad company cannot be affected by the operation of

Section 5 of the Act, unless the Act creates a liability on the Railroad Company for injuries to express messengers.

The liability created by the Act is that "any common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * if such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, machinery, track, etc., or other equipment." This language clearly covers only the case of employer and employe and it has been held that Congress used these words in their usual significance. *Robinson* vs. *The B. & O. R. R. Co.*, 237 U. S. 84. In that case it was sought to bring a Pullman porter within the application of the Act by contending that he was really in the employ of the railroad, but this court refused to so hold, and held that Pullman employ s were not included in the operation of the Act. Certainly the duties of an express messenger are not more inseparably connected with the operation of a railroad than those of a Pullman porter and the services performed by the Pullman Company are just as much a function which the railroad company could properly perform as those performed by the express company.

This is not the sort of negligence against which the statute is aimed. It is clearly shown by debates in Congress that the act was aimed at the so-called fellow-servant doctrine and at the efforts of common carriers to exempt themselves from liability for their own negligence, but it has

never been decided or, so far as appellee has been able to discover, even contended before that the act goes so far as to make an employer liable for negligence of a third party or to establish a rule of public policy than an employe cannot assume as a condition of his employment the risk caused by the possible negligence of a third party.

THIRD POINT

The contract in question is not against public policy.

The case before the court is not the case of an employer attempting to exempt himself from negligence to his own employe, nor does it attempt to make the messenger assume the risks of injury from his fellow servants. The contract contemplated that the respondent would assume the risk of injury because of the possible negligence of a third party, the railroad company. It has been repeatedly held that contracts similar to the contract between the railroad and express companies are good. *Santa Fe, Prescott & Phoenix R. R. Co.* vs. *Grant-Willis Construction Co.*, 228 U. S. 177, and cases cited. The cases were decided on the ground that the companies when making these contracts are not acting as common carriers. Similarly, the contract between the company and its employe has been recognized as valid and not contrary to public policy since the decision of *Baltimore & Ohio* vs. *Voigt*, 176 U. S. 498.

The state as well as Federal courts have long recognized the soundness of these contracts, and the effect of a decision that this contract was avoided by the Employers' Liability Act would create a great deal of confusion and an absolute conflict between the Federal rule and that of many important state tribunals.

Eleven years have passed since The Federal Employers' Liability Act was enacted and yet, with the exception of the present case, we have been unable to find a reported case in which the contention was made that the Act applied to express messenger contracts. Yet many suits have been brought within this period for injuries to express company employees due to the negligence of the railroad companies' servants.

In practically all jurisdictions such contracts have been held not to be contrary to public policy.

McKay & Louisville vs. *N. R. Co. et al.*, 182 S. W. 874 (Tenn., February 11, 1916);

Perry vs. *Philadelphia R. & W. R. Co.*, 77 Atl. 725 (Del, June 28, 1910);

Higgins vs. *Erie R. Co.*, 99 Atl. 98 (N. J. 1916).

FOURTH POINT.

The Court below had jurisdiction to enjoin the enforcement of the judgment secured by respondent in the State Court.

The petitioner's bills, as amended, stated an original, independent, equitable cause of action. The bill was for the specific performance of a contract, and showed that the complaint had no adequate remedy in a court of law. The diversity of citizenship existed, and the amount in controversy give this court jurisdiction. Incidental to the specific performance of the contract, and in order that a court of equity might administer complete relief, an injunction was asked against the appellant prohibiting him from collecting a judgment for $4,000 obtained in the state court.

There are two reasons why this suit is properly maintainable and complete relief may be administered by the Federal Court, even though it be necessary to enjoin the collection of this judgment. The first is, that the gravamen and foundation of this suit is based upon the proposition that the plaintiff is entitled to a specific performance of this contract and has no adequate remedy at law. Suppose that Taylor had never filed his suit in the state court, but was merely threatening to file it, or had declined, upon request, to execute to the Railroad Co. and the Express Co. a release for the injury sustained, then a bill filed setting forth fully these facts would have been maintainable in a court of equity

under the well recognized rules. Instead, however, of this being the case, the appellant Taylor violated his contract by filing this suit. Upon his violation of the contract the Express Co. had a right to seek a court of equity to enforce the contract. It had the right either to file this bill in a chancery court of Mississippi, or to file the bill on the equity side of the docket of the United States District Court. Under its constitutional right it chose the latter court. The foundation of the equitable jurisdiction of the court is the specific performance of a contract. As an incident to that performance, and incidentally to preserve the status quo and to administer adequate and complete relief against the conduct of Taylor, it becomes essential to enjoin the collection of this judgment in the state court. We submit that the authorities hold that when the injunction is merely an incident, and not the foundation of the suit, then injunctions of this character are not violative of Sec. 720 of the United States Revised Statutes.

Second: The decisions of the Supreme Court recognize an exception under the above section where a judgment in the state court has been obtained by fraud. The fraud heretofore considered by that court has been that of a party to the suit in the state court, and that the judgment obtained there was obtained through fraud practiced on the state court. These suits, however, were maintained by parties who had also been parties to the suit in the state court. So, the exact question here presented is not presented in the opinions from which we quote. It is our

contention here, and the testimony and the decree of the lower court sustain it, that the appellant Taylor, by his conduct in filing the suit in the state court against the Railroad Co., and depriving this appellee of the provision of being allowed to defend that suit, has practiced a fraud upon the appellee. This being true, a court of conscience will not now permit him to reap the benefit of his fraudulent conduct. In direct violation of his contract, Taylor filed suit in a court of ladw of the State of Mississippi against the Railroad Co. The appellee, with whom Taylor had the contract, attempted to be made a party to this suit in order that it might protect its rights and remove the case to the Federal Court. The defendant Railroad Co. at the same time filed a motion asking that appellee be made a party defendant. The record shows that the petition of appellee was denied and the motion of the Railroad Co. overruled. It is a just inference from the record that Taylor resisted both the petition and the motion. At any rate, though due diligence was exercised by the Express Co., it was not permitted to become a party to the suit in the state court. It had no right of appeal from this decision of the court. Complainant has a right to its day in court. It could not become a party to the suit in the state circuit court, and in the exercise of its constitutional prerogaive it sought the jurisdiction of the Federal court. The equitable grounds of relief existing, we submit that this court will exercise and give to this

complainant adequate and complete relief. The leading case on this subject is *Marshall* v. *Holmes*, 141 U. S. 589, 599:

> "Such was the case made in the petition. The relief asked was an injunction against Mayer and the defendant in error, Holmes, sheriff of the parish, restraining them from executing the above judgments or any of them; that Mayer be cited to answer the petitioner's demand; that the judgments be annulled and avoided as obtained upon false testimony and forged documents; and that the petitioner have general and equitable relief. * * * (Statement of facts, p. 592.)
>
> "These authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

Terre Haute R. R. Co. v. *Peoria, etc., Co.*, 82 Fed. 943.

Payne v. *Hook*, 7 Wall. 425.

Barrow v. *Hunton*, 99 U. S. 80.

Insurance Co. v. *Hodgson*, 7 Cranch 332.

Hendrickson v. *Hinckley*, 17 How. 443.
Gaines v. *Fuentes, et al.*, 2 Otto 10.
Dietzsch v. *Huidekoper*, 103 U. S. 494.
Insurance Co. v. *Schmidt*, 126 Fed. 998.
Donovan v. *Express Co.*, 94 C. C. A. 609.
Ex parte Cutting, 4 Otto 14.
Railway Co. v. *Insurance Co.*, 109 U. S. 168.
Jones & Laughlin L'd. v. *Sands*, 79 Fed. 913.
Credits Commutation Co. v. *U. S.*, 177 U. S. 311.

FIFTH POINT.

The amendment to petitioner's original bill was properly allowed by the District Court.

The DistrictCourt had the power and it was proper to allow an amendment after the cause was reversed and remanded. Equity Rule No. 9, *Insurance Company* vs. *Hill*, 193 U. S. 553; *United States* vs. *Lehigh Valley Railway Co.*, 220 U. S. 257; *Hardin* vs. *Boyd*, 113 U. S. 756; re *Sanford Fork & Tool Co.*, 160 U. S. 247, 258; re *Potts*, 166 U. S. 267.

The decree of reversal was based upon the pleadings and not upon the merits of the case. It was not a final decree nor did it order the District Court to enter a final decree dismissing the bill of complaint. *Smith* vs. *Adams*, 130 U. S. 167; re *Sanford Fork & Tool Co.*, 160 U. S. 247. The first

opinion of the Circuit Court of Appeals practically meant that the District Court should have sustained the demurrer to the petitioner's original bill. Had this been done the bill could then have been amended with legal court. Equity Rules 19 and 28; re *Sanford Fork & Tool Co.*, supra; *United States* v. *Lehigh Valley Railway Co.*, supra.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed.

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